FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 10 1950
JAMES R. BROWNING, Clerk

No. 660

In the Supreme Court of the United States

October Term, 1949

TRAVELERS INSURANCE COMPANY AND C. W. SEATON, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
PHILIP B. PERLMAN,
Assistant Attorney General,
ROBERT L. STERN,
ERNEST A. GROSS, Jr.,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement of the case	2
Argument	4
Conclusion	7

CITATIONS

Cases:	
Comstock v. *Group of Investors*, 335 U.S. 211	5
Corn Products Co. v. *Commissioner*, 350 U.S. 46	5
Kipp v. *Goffe & Carkener*, 144 Kan. 95	5, 6
Propper v. *Clark*, 337 U.S. 472	7
Spiegel, Estate of v. *Comm'r.*, 335 U.S. 701	7
Statute:	
28 U.S.C. 1292(b)	4

540396—60

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 660

TRAVELERS INDEMNITY COMPANY AND C. W. SHAFFER, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the district court. The opinion of the Court of Appeals (Pet. App. A1–A6) is reported at 271 F. 2d 521.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1959. The petition for a writ of certiorari was filed on January 26, 1960. The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. 1292(b) (Pet. App. A3) and the jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts as found by the district court, and under Kansas law, there arose the relationship of bailor-bailee between the producers of wheat and a warehouseman where wheat was delivered to an unlicensed warehouse for transfer to, and storage in, a licensed warehouse operated by the same warehouseman.

STATEMENT OF THE CASE

In 1957, James K. Luder, d/b/a Dorrance Grain Company, operated at Dorrance, Kansas, a public grain warehouse licensed by the State of Kansas. In addition to the licensed warehouse, Luder also operated an unlicensed warehouse at Waldo, Kansas. In 1957, 16 warehouse receipts, representing 6,612.95 bushels of 1957 crop wheat, were drawn on the Dorrance warehouse and issued to 16 producers of wheat. The receipts were subsequently pledged to the Commodity Credit Corporation as collateral security for price support loans (Pet. App. A8–A9).

In November 1957, it was determined that Luder did not have sufficient grain in his warehouse at Dorrance to satisfy his outstanding storage obligations and that he was insolvent (Pet. App. A18). The United States, on behalf of the Commodity Credit Corporation, brought suit to have a receiver appointed, to obtain a determination of the rights of the United States and other holders of storage obligations, and to have a distribution of the wheat, or the proceeds, on hand at the Dorrance warehouse. The petition, in addition to Luder and other holders of storage obligations, named as defendants the Trav-

elers Indemnity Company, the surety on Luder's warehouse bond, and C. W. Shaffer, indemnitor, and sought a judgment against the surety to the extent that the grain in Luder's warehouse was insufficient to satisfy his storage obligations.

In the proceedings in the district court the surety questioned whether the warehouse receipts pledged to Commodity were valid storage obligations of the warehouseman since the grain represented by the warehouse receipts was delivered by the producers to Luder's unlicensed warehouse at Waldo, Kansas, and from there transferred by the warehouseman to the warehouse at Dorrance, Kansas.

In interlocutory findings, conclusions and an order the district court found (Pet. App. A11) that the wheat was delivered by the producers with the understanding that each producer would retain title to, and all beneficial interest in, the wheat delivered by them with the exclusive right to sell, mortgage, pledge or otherwise dispose of the wheat. It was found (Pet. App. A8) that none of the producers sold or intended to sell their wheat and Luder did not intend to buy their wheat; that the elevator at Waldo was used solely as a place for receipt of the wheat intended for storage by the producers and that the producers entered into oral contracts with Luder pursuant to which Luder as the agent and employee of the producers was to truck the wheat to Luder's licensed warehouse at Dorrance, Kansas (Pet. App. A19–A20). It was further found that the wheat to be trucked to Dorrance was to be kept separate from wheat purchased by Luder at the Waldo ele-

vator, and that, after the wheat had been trucked to Dorrance, Luder then issued warehouse receipts on his Dorrance warehouse (Pet. App. A8–A9). On these facts, the district court concluded that when the producers' wheat was desposited in the Dorrance warehouse and warehouse receipts were issued, valid and enforcible storage obligations were created (Pet. App. A20).[1]

On appeal by the surety, under 28 U.S.C. 1292(b), the Court of Appeals affirmed. The court agreed with the trial court that the transaction between the warehouseman and the producers resulted in a bailment and that the title to the wheat remained with the producers (Pet. App. A5). The court held, contrary to the surety's contention, that nothing in the statutes or decisions of the State of Kansas required that the transactions between the producers and Luder be treated as sales rather than valid storage agreements.

ARGUMENT

There is no occasion for this Court to review the decision below. On uncontradicted testimony, both the district court and the Court of Appeals have found and concluded that the transactions between the wheat producers and the warehouseman gave rise to a bailor-bailee relationship and that the warehouse receipts negotiated to the Commodity Credit Corporation represent valid storage obligations of the warehouseman. Short of exceptional error, not even

[1] The court in its interlocutory order (Pet. App. A10–A18) made additional determinations not material to the surety's appeal or to the petition in this Court.

arguably present here, the concurrent findings of fact of the courts below should be deemed conclusive in this Court. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51; *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

Petitioners' argument (Pet. App. 9) that, as a matter of Kansas law, the transactions between producers and Luder must be deemed a "completed sale" of the grain is without merit. *Kipp* v. *Goffe & Carkener*, 144 Kan. 95, 58 P. 2d 102, on which petitioners rest their argument, "is distinguishable on the facts, and not applicable" (Pet. App. A5). The *Kipp* case was an action for conversion by a producer of grain against a third party who purchased or otherwise acquired, from an unlicensed warehouseman, grain produced by the plaintiff. The evidence in the case "was open to the construction that plaintiff took his wheat to the [unlicensed] elevator without any intention of having it returned to him, or exercising any control over it, but with the intention of taking his scale tickets to the elevator when the price suited him and receiving pay for it." 144 Kan. at 106. The Kansas court concluded that the transaction was a sale, not a bailment.

The facts in the *Kipp* case and this case differ in essential respects. Here, both the producers and the warehouseman confirmed, and the district court found (Pet. App. A11), that the grain in question was delivered to the warehouseman with the understanding that the producers "would retain title and all beneficial interest in and to the said wheat * * * with the exclusive right to sell, mortgage, pledge, or otherwise dispose

of same" (Pet. App. A11); furthermore, as the trial court found, "[n]one of the producers sold or intended to sell their wheat and Luder [the warehouseman] did not buy or intend to buy their wheat" (App. A8). A still further distinguishing feature is that in *Kipp* the transaction was between a producer and an *unlicensed* warehouseman. Here, Luder was duly licensed under Kansas law to operate a grain warehouse at Dorrance, Kansas, and the warehouse receipts issued by Luder and negotiated to Commodity were drawn on the Dorrance house after the grain was trucked there by the warehouseman, as the producers' agent (Pet. App. A8–A9), from the unlicensed facility at Waldo, Kansas, which was used solely as a dumping place for wheat intended for storage (Pet. App. A8).

In the light of the facts of this case and the question involved, the other authorities relied upon by petitioners (Pet. 13–21) fail to demonstrate any error in the decisions below. And the same is true of the Kansas warehousing statute quoted by petitioners (Pet. 4–7). As stated by the Court of Appeals: "Clearly, the purpose of the [Kansas] statute is to protect the public, including farmers who store their grain in warehouse facilities. To hold, as contended for by appellants, would be directly contrary to this purpose. It would provide a method whereby an innocent grain owner would lose title to his product even though it was stored in a licensed warehouse as the parties intended it ultimately should be" (Pet. App. A5–A6). Moreover, the fact that both courts below have jurisdiction of cases arising in the

State of Kansas, and are constantly dealing with issues of Kansas law, make it even more probable that Kansas law was correctly applied to the facts of this case. See *Propper* v. *Clark*, 337 U.S. 472, 486–7; *Estate of Spiegel* v. *Comm'r.*, 335 U.S. 701, 707–8.

CONCLUSION

The decision of the Court of Appeals is clearly correct. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
JOHN G. LAUGHLIN, JR.,
Attorneys.

FEBRUARY 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960